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In the Supreme Court of the United States.

OCTOBER TERM, 1918.

JOHN KENNY, PETITIONER, *v.* LABAN MILES AND JOHN L. BIRD, ADMINISTRATOR of the estate of Lah-Tah-Sah, deceased.	No. 179.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF FOR PETITIONER.

STATEMENT.

The writ of certiorari in this case brings up for review a judgment of the Supreme Court of Oklahoma (R. 125) affirming a judgment of the District Court of Osage County (R. 71, 115), which adjudged the respondent Laban Miles to be the surviving husband of Lah-tah-sah, a deceased Osage Indian woman, and entitled to share in her estate equally with her sole surviving child, the petitioner John Kenny.

The case was begun in the County Court of Osage County by Miles, who filed a petition for letters of administration, alleging that he was the husband of

the deceased Osage allottee No. 256; that she died intestate August 19, 1908; that her only heirs were himself, and Kenny, her son; that as the surviving husband he was entitled to administer upon her estate; and recommending the appointment of the respondent, John Bird, as administrator. The general character and probable value of the estate was alleged as follows (R. 4):

> Lands allotted to her as a member of the Osage Tribe of Indians, in Osage County, Oklahoma, amounting to about 660 acres of the approximate yearly rental of $500.00, and tribal trust funds belonging to her as a member of such tribe, and to her credit in the Treasury of the United States, together with oil, gas and other mineral annuities of the approximate yearly income of $600.00.

Bird was appointed and qualified as administrator and letters of administration were issued to him (R. 7–8). Thereupon Miles filed a suit in the District Court of Osage County against Kenny for a partition of that part of the estate of the deceased consisting of the lands allotted to her, alleging that he as surviving husband and Kenny as the sole surviving child of the deceased were her only heirs at law (R. 49). Kenny answered denying the alleged heirship of Miles and alleging that he as the son and sole surviving heir of the deceased was entitled to the whole of her estate (R. 50). At the conclusion of the trial which followed the District Court entered a judgment that Miles was married to the deceased

in September, 1907, according to Osage Indian custom, and was her husband at the time of her death on August 19, 1908, and that Miles as surviving husband and Kenny as sole surviving child were the only heirs and owners in common of the allotment of the deceased Lah-tah-sah, Osage allottee No. 256, their respective interests being as follows (R. 52, 54):

> Laban Miles, plaintiff, Osage allottee No. 507, an undivided one-half.
>
> John Kenny, Osage allottee No. 257, an undivided one-half.

It was further ordered that partition be made accordingly, commissioners were appointed to make the partition, if that could be done without injury; otherwise to appraise the value of the property (R. 54). The commissioners reported their inability to make partition of the allotted land in kind without manifest injury, and that its market value was $3,900 (R. 59–60). On motion of Miles (R. 61) this report was accepted and an order of sale was entered (R. 62). It does not appear that any sale was ever made or that the judgment or any proceedings thereunder were ever approved by the Secretary of the Interior.

Pending the partition suit in the District Court the administration in the County Court was suspended. After the judgment in partition the administrator filed his final report in the County Court, showing his possession of the allotted lands of the appraised value of $3,900, and $210 cash on hand, derived from a lease of the lands, less disbursements

(R. 9–13), and praying that the court determine the heirs of the deceased to be Miles and Kenny and authorize distribution of "the above balance" to them in equal shares (R. 13). Kenny appeared and filed objections to the report, alleging that Miles was not an heir and that he was sole heir of the deceased (R. 14). Miles thereupon filed a "plea of *res judicata*" setting out the judgment of partition rendered by the District Court as conclusive of his marriage to the deceased (R. 14). Kenny demurred on the ground that the judgment was void for want of jurisdiction, and this being overruled (R. 18), he answered (R. 19) with a general denial and also denying that Miles was ever married to the deceased, and alleging that the District Court was without jurisdiction to render the partition judgment, the land being subject to restriction against alienation, and (R. 20)—

> That said decedent, said Laban Miles and said John Kenny are and were members of the Osage Tribe of Indians, of the full blood, residing in Osage County, Oklahoma, neither of whom have received a certificate of competency, and all of whom were and are incompetent Indians; and the Secretary of the Interior refused and failed to confirm or approve said judgment and proceedings of said District Court, and the same is void and of no effect.

The County Court, on motion of Miles, struck out that portion of Kenny's answer denying the marriage of Miles to the deceased (R. 21) and entered a judg-

ment approving the final account of the administrator, allowing him $12 as compensation for services, and directing him to "pay the remainder of the money now in his hands belonging to said estate, one-half to Laban Miles, and one-half to said John Kenny, and take their receipt therefor and file the same in this Court and thereupon be discharged" (R. 22). The judgment also contained the following determination for the disposition of the "entire estate" (R. 22):

> The court further finds from the evidence that the sole and only heirs of said Lah-tah-sah, deceased, are Laban Miles, surviving husband, and John Kenny, the only issue of said Lah-tah-sah, deceased, and that upon her death *the entire estate* of said Lah-tah-sah, deceased, descended in equal shares to said Laban Miles and said John Kenny, to-wit: An undivided ½ to each. [Italics ours.]

And also the following (R. 22):

> It is further ordered, adjudged and decreed by the Court, that the sole and only heirs of Lah-tah-sah, deceased, are Laban Miles, surviving husband, and said John Kenny, the only issue of said Lah-tah-sah, deceased; that upon the death of said Lah-tah-sah, deceased, *her entire estate* descended in equal shares to said Laban Miles and said John Kenny, to wit: an undivided ½ thereof to each. [Italics ours.]

From this judgment Kenny appealed to the District Court of Osage County, the same court that rendered the partition judgment (R. 26), and the

case was there tried *de novo* on the pleadings filed in the County Court (R. 33 *et seq.*).

The District Court sustained a motion made by Miles in the County Court to strike out all of Kenny's answer to the plea of *res judicata* except the general denial (R. 34). On the trial it was admitted that the deceased allottee, as well as both Kenny and Miles, were full-blood members of the Osage Indian Tribe, and that none of them had ever received a certificate of competency (R. 46–47). It was also shown that the deceased died August 19, 1908 (R. 42, 50), and that the deeds for her allotment conveying to her separately the homestead of 160 acres and surplus of 500.12 acres were dated September 23, 1908, and May 5, 1909 (R. 66, 68). Miles offered the partition judgment to which Kenny objected on substantially the grounds stated in his answer to the plea of *res judicata*, but his objection was overruled (R. 36). Kenny offered to prove by witnesses and declarations of Miles that Miles never was married to the deceased, but the testimony was excluded on the ground that the marriage had been conclusively established by the partition judgment (R. 41, 43, 45–46). Thereupon the District Court entered judgment, affirming the judgment of the County Court with reference to the administrator's account and division of the small sum in his hands between Miles and Kenny, and further determining the disposition of the "entire estate" as follows (R. 72, 117):

The court further finds from the evidence that the heirs of the estate of said Lah-tah-sah, deceased, have heretofore been determined by the District Court of Osage County, Oklahoma, in the partition suit of Laban Miles, plaintiff, vs. John Kenny, defendant, No. 1896, as per judgment of court pleaded herein by said Laban Miles as a plea of res adjudicata. That said plea of res adjudicata should be sustained.

The court further finds from the evidence that the sole and only legal heirs of said Lah-tah-sah, deceased, are appellee, Laban Miles, surviving husband and appellant, John Kenny, the only living issue of said Lah-tah-sah, deceased; that upon the death of said Lah-tah-sah, deceased, *her entire estate consisting of lands, moneys and mineral interests acquired by her through the division of the lands of the Osage Indians in Oklahoma, and the segregation of moneys belonging to said tribe held by the United States, as a member of the Osage Tribe of Indians,* descended in equal shares to said Laban Miles, surviving husband, and said John Kenny, only living child, to wit: an undivided one-half to each. [Italics ours.]

And further (R. 73, 117):

It is further ordered, adjudged and decreed by the court that the sole and only heirs of Lah-tah-sah, deceased, Osage Allottee, No. 256, are Laban Miles, surviving husband, and John Kenny, the only living issue of said Lah-tah-sah, deceased, at the time of her death; that upon the death of said Lah-tah-

> sah, deceased, *her entire estate* descended in equal shares to said Laban Miles and to said John Kenny, to wit: an undivided one-half thereof to each. [Italics ours.]

The Supreme Court of Oklahoma considered the case as if it involved a division of the allotment, and that alone, between Miles and Kenny, and finding, contrary to the record, that the allotment was selected after the allottee's death, held that the lands went to the heirs of the allottee in their own right free from restriction against alienation, and affirmed the judgment. In its opinion (R. 196) the court said:

> Plaintiff in error seeks a reversal of a judgment of the District Court of Osage County, rendered April 2, 1915, upon appeal from the County Court of that county, ordering a distribution of the estate of a deceased member of the Osage Tribe of Indians, *consisting of lands selected and patented in her name subsequent to her death, and certain proceeds arising from the rental thereof.*
>
> The decedent Lah-tah-sah, a member of the Osage Tribe, entitled to a distributive share of the tribal property by virtue of an Act of Congress approved June 28, 1906 (34 Stat. L. 539), died intestate in 1908, before receiving the same. *After her death the lands involved were selected in her right* and deeds therefor, approved by the Secretary of the Interior, were executed in her name as grantee, and recorded. [Italics ours.]

And again (R. 204):

> We hold that the Act of June 28, 1906, placed no restrictions upon alienation by heirs of inherited lands allotted and deeded in the right of a member of the Osage tribe after his death, save only the interest in the minerals, reserved to the tribe, the individual disposition of which is expressly inhibited.
>
> The evident purpose of the Act of April 15, 1912, supra, was not to impose restrictions upon alienation of Osage lands, but to authorize the conveyance of such of said lands to which restrictions had attached by reason of their allotment to living members of the tribe who had subsequently died, leaving surviving them Indian heirs, members of the tribe, to whom certificates of competency were issued.

And finally (R. 205):

> We conclude that the district court of Osage County had jurisdiction to partition the lands involved, and that its judgment was conclusive of the rights of the parties in this proceeding to share equally in the disposition of the lands in question.

The act of June 28, 1906, 34 Stat. 539, under which was made the division of Osage tribal land and its allotment to individual Osage Indians, provided, as hereinafter shown, for first, second, and third selections of 160 acres each by each allottee, one 160-acre tract to be designated by the allottee as a homestead, and after these selections had been made the Osage Commission was directed to allot

as equally as practicable among the Osages the remaining lands.

SPECIFICATION OF ERROR.

Error in ruling that the allotment of Lah-tah-sah, Osage Indian Allottee No. 256, passed to her incompetent heirs subject to partition without approval by the Secretary of the Interior.

PROPOSITIONS.

1. The allotment of the first, second, and third selections having been made during the lifetime of the allottee, no partition of the land was valid until approved by the Secretary of the Interior.

2. Regardless of when these selections or the additional surplus allotment were made to the allottee, no partition thereof is valid until approved by the Secretary of the Interior.

ARGUMENT.

I.

The allotment of the first, second, and third selections having been made during the lifetime of the allottee, no partition of the land was valid until approved by the Secretary of the Interior.

While this court will not ordinarily review the findings of fact by the State Supreme Court, the question of whether the allotment in controversy is subject to partition without the approval of the Secretary of the Interior is a question both of law and fact so intermingled as to make it necessary, for the

purpose of passing on the Federal question involved, to analyze the facts and to determine whether there is any substantial evidence in the record to sustain the finding that the allotment was selected after the allottee's death, as the right to partition these lands without the approval of the Secretary, the Federal question involved, is made to depend in the judgment of the Supreme Court of Oklahoma upon this finding. This brings this case well within the exceptions to this rule, pointed out in

Jones National Bank v. *Yates*, 240 U. S. 541, 552, and cases cited.

Creswill v. *Knights of Pythias*, 225 U. S. 246, 261, and cases cited.

The division of the Osage lands and funds and the allotment of the lands among the members of the tribe were made under the provisions of the act of June 28, 1906, 34 Stat. 539.

Section 2 provides: (First) That each member of the tribe upon the tribal rolls should be permitted to select 160 acres as the first selection; (third) after each member had made his first selection each was permitted to make an extra selection of 160 acres in the manner provided in making the first selection; (fourth) after each member had selected a second selection each member was permitted to make a third selection of 160 acres as provided in making the first and second selections; each member was then permitted to designate which of his three selections should be a homestead, and his certificate of

allotment and deed was to designate the same as a homestead, which was inalienable and nontaxable until otherwise provided by act of Congress; the other two selections, together with his or her share of the remaining lands allotted to the member, were to be known as surplus lands and were to be inalienable for 25 years, except by a later provision of the same section (seventh) the Secretary of the Interior was empowered to issue certificate of competency authorizing the sale and conveyance of lands except the homestead; (fifth) after each member had made the first, second, and third selection of 160 acres, the remaining land was to be divided as equally as practicable among the members by the commission appointed to supervise the selection and division of these lands; (sixth) the selections provided for were to be made under the supervision of this commission, and the schedule of selections was subject to the approval of the Secretary of the Interior.

The act of April 18, 1912, 37 Stat. 86, is supplementary to and amendatory of the act of 1906, and provides, among other things, that the property of the deceased allottees of the Osage tribe shall in probate matters be subject to the county courts in the State of Oklahoma and that no land is to be sold or alienated under the provisions of section 3 of the act without the approval of the Secretary of the Interior. Section 6 of the act provides that no partition or sale of the restricted lands of a deceased Osage allottee shall be valid until approved by the

Secretary of the Interior. For convenience, this section is printed in the margin hereof.[1]

The opinion of the Supreme Court of Oklahoma that this land is free from restriction is based upon its finding that the lands were selected and allotted in the right of Lah-tah-sah after her death. It is clear that section 3 of the act of April 18, 1912, prohibits the alienation of restricted lands without the approval of the Secretary of the Interior, and section 6 provides that no partition or sale thereof shall be valid until approved by the Secretary of the Interior. Therefore it follows that if this land was allotted to a living member it is restricted land and the action of the Supreme Court in directing its partition and sale is erroneous.

[1] Section 6. That from and after the approval of this act the lands of deceased Osage allottees, unless the heirs agree to partition the same, may be partitioned or sold upon proper order of any court of competent jurisdiction in accordance with the laws of the State of Oklahoma: *Provided*, That no partition or sale of the restricted lands of a deceased Osage allottee shall be valid until approved by the Secretary of the Interior. Where some of the heirs are minors, the said court shall appoint a guardian ad litem for said minors in the matter of said partition, and partition of said land shall be valid when approved by the court and the Secretary of the Interior. When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed. If some of the heirs are competent and others have not certificates of competency, the proceeds of such part of the sale as the competent heirs shall be entitled to shall be paid to them without the intervention of an administrator. The shares due minor heirs, including such minor Indian heirs as may not be tribal members and those Indian heirs not having certificates of competency, shall be paid into the Treasury of the United States and placed to the credit of the Indians upon the same conditions as attach to segregated shares of the Osage national fund, or with the approval of the Secretary of the Interior paid to the duly appointed guardian. The same disposition as herein provided for with reference to the proceeds of inherited lands sold shall be made of the money in the Treasury of the United States to the credit of deceased Osage allottees.

It is evident that the allotment in this case was made to Lah-tah-sah while in life.

An analysis of the provisions of the act of 1906 shows that the designation of a homestead was not to be made by a member of the Osage tribe until after the selection of the third 160 acres provided for in the act.

Lah-tah-sah died August 19, 1908, and the deed to her homestead was made September 23, 1908. While the record does not expressly state that any selection of any of the allotted land as a homestead was made during her lifetime, it is a fair presumption from this evidence, taking into consideration the statutory requirements, that it was done, and that at that time the first, second, and third selections of 160 acres each had been made. The law did not contemplate the designation of a homestead for a dead Indian, and such a designation by a living allottee was to have been made only after the selection of the third 160 acres. When it is considered that these selections and designations had to be made under the supervision of a commission and the approval of the allotments was to be made by the Secretary of the Interior, the deduction is irresistible that it was impossible, in view of the time necessarily consumed in these proceedings, that the selection could have been made after August 19, 1908. These allotments were made by families, and Lah-tah-sah was allotted as a head of a family as No. 256, while her son, John Kenny, the petitioner, was allotted as No. 257.

Section 6 of the act of 1912 confers jurisdiction upon the probate court of the State of Oklahoma for the partition of "the lands of deceased Osage allottees" subject to the approval of the Secretary of the Interior, and the petition for letters of administration filed by Laban Miles in the county court of Osage County (R. 4) in the matter of the estate of Lah-tah-sah, Osage allottee No. 256, deceased, alleges that the decedent left an estate in the county of Osage, the general character being stated as lands allotted to her as a member of the Osage Tribe of Indians, in Osage County, Okla. The theory upon which the administrator proceeded, therefore, was that the allotment was a part of the estate of the decedent and did not go direct to the heirs in their own right, and whatever title vested in the heirs vested by inheritance and not by virtue of selection after the death of the allottee.

After each allottee had selected three 160-acre tracts under the law, the commission was authorized to divide the remaining lands as equally as practicable among the members of the tribe. The two selections other than the 160-acre homestead tract were known as surplus lands, and the lands parcelled out among the Indians by the commissioners in their final schedule were known as additional surplus lands. The contention that the homestead, and the two surplus selections of Lah-tah-sah, containing 480 acres of 660.12 acres, comprising her entire allotment, were not selected until after her death, is conclusively answered by the Osage schedule of the first, second,

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and third selections, a certified copy of which is printed herewith as Appendix "A." From this schedule it appears that these selections were made and allotted prior to June 16, 1908, when the schedule was reported to the Secretary of the Interior for approval, and comprise (first selection) the N. W. ¼ of sec. 26, T. 24, R. 4, 160 acres, homestead; (second selection) the N. E. ¼ of sec. 30, T. 28, R. 9, 160 acres; (third selection) the S. E. ¼ of sec. 30, T. 28, R. 9, 160 acres. Inasmuch as the allottee's death did not occur until August 19, 1908, it is clear that these three selections were selected by and allotted to her during her lifetime, and, under any view of the case, come within the provision of the act of 1912 prohibiting the alienation of the lands of deceased allottees of the Osage tribe or their partition without the approval of the Secretary of the Interior.

This court fully reviewed the provisions of the act dividing the Osage lands and funds in *Levindale Lead & Zinc Mining Co.* v. *Coleman*, 241 U. S. 432. While the questions in controversy here were not raised in that case, in analyzing this act and deciding that the land of a white man inherited from a member of the tribe was unrestricted, the court said (p. 437):

> Taken in their natural sense, the provisions of the fourth paragraph of section 2 apply only to allotments made to members of the tribe. There is nothing to suggest that a non-member should designate a "homestead," and unless lands were thus segregated the restrictions as to "homesteads" would not apply. With respect to "surplus lands" it will be observed

> that it is only selections of each "member," and the share of remaining lands "allotted to the member," which constitute lands so described and thus come under the stated restrictions.

This clearly indicates the views of this court to the effect that selections of members of the tribe come under the "stated restrictions."

Aaron v. *United States*, 204 Fed. 943, is directly in point, and holds that the lands of full-blood Osage Indian allottees selected by and allotted to them before their decease were inalienable by their full-blood heirs under the act of June 28, 1906, and says (p. 945):

> The fact that the deeds of these allotments were subsequently made to the heirs of Cena June after her decease is immaterial. When the allotments had been made, the equitable title, the right to the legal title, and the entire beneficial interest in these lands, subject to the restrictions upon alienation imposed upon them by the act of Congress at the time they were allotted, vested in the allottee, and the titles to these allotments under the subsequent deeds to her heirs related back to and took effect at the time of the allotments. There is therefore no escape from the conclusion that the titles of the heir to the homestead lands and the surplus lands of this allottee were subject to the respective restrictions imposed upon those classes of lands by the act of June 28, 1906. And this concludes the controversy about the surplus lands; for it is not claimed that the restriction imposed upon their alienation by the fourth paragraph of section 2 had been removed on March 5, 1909, when Buffalo made his deeds.

II.

Regardless of when the additional surplus allotment was made to the allottee, no partition thereof is valid until approved by the Secretary of the Interior.

The record does not explicitly disclose when the final division and allotment among the Osage Indians was made by the allotting commission nor, as aforesaid, when the homestead, surplus, and additional surplus land of Lah-tah-sah was allotted to her. We have shown from the schedule of the first, second, and third selections, however, that those selections were allotted to her prior to June 16, 1908, and therefore prior to her death on August 19, 1908. The Schedule of Final Division of Osage Lands made by the Osage Allotting Commission (Appendix "A") was certified to the Secretary of the Interior March 29, 1909, and it there appears that prior to that time Lot 3, the E. ½ of the SW. ¼ of the NW. ¼, the SE. ¼ of the NW. ¼, and the N. ½ of the SE. ¼ of sec. 4, T. 20, R. 10, containing 180.12 acres, was allotted to her. The act of 1906 did not contemplate any selection by the allottee of his or her interest in the land remaining after the first, second, and third selections, but the duty was put upon the commission to divide these lands "as equally as practicable." This division was in the nature of a partition among tenants in common and the right to the property existed before the allotment. The act provided for the allotment of all the Indians on the roll of the tribe as it existed on January 1, 1906, and of certain children therein specified who were not on the roll, and section 6 of the act provides:

> That the lands, moneys, and mineral interests, herein provided for, of any deceased

> member of the Osage tribe, shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma.

The allotment therefore created no new right in the heirs and they acquired their rights by inheritance and not by purchase. *McDougal* v. *McKay*, 237 U. S. 372, 383. The contention that the restriction on alienation imposed by this act applied only to lands allotted to living members is inconsistent with the evident purpose of the act, which was to protect the property of these Indians, after division, in the hands of incompetents, and to put upon the Secretary of the Interior the duty and obligation of administering this property. Such a contention is absolutely inconsistent also with the provisions of section 7 of the act, which, after providing that the lands are to be set aside for the sole use and benefit of members of the tribe, or their heirs, and that the members or their heirs shall have the right to use and lease the lands, further provides:

> That all leases given on said lands for the benefit of individual members of the tribe entitled thereto, or for their heirs, shall be subject only to the approval of the Secretary of the Interior.

This inhibits the leasing of the lands without the approval of the Secretary, and it is wholly at variance with any construction of the act which permits such heirs to sell any of their lands without the approval of the Secretary.

The statute must be construed in the light of the policy it was intended to execute—the policy of protecting the welfare of the wards of the United States. *Levindale Lead & Zinc Mining Co.* v. *Coleman, supra,*

p. 437, and restrictions were intended to be placed on all the lands in the hands of incompetents. It is immaterial to determine whether these restrictions attached immediately upon the final division of this land by the Osage allotting commission and ran with the land until they expired by limitation (*Bowling* v. *United States*, 233 U. S. 528), since the language of the act plainly shows that the Indians themselves were deemed to be subjected to the restrictions. *Levindale Lead & Zinc Mining Co.* v. *Coleman*, *supra*, p. 438. It is further immaterial to determine whether these restrictions were placed upon the lands or the Indians by the act of 1906, for the act of 1912 clearly shows that Congress had restricted the sale (sec. 3) and partition (sec. 6) of the lands of deceased Osage allottees, and section 6 specifically provides when the restriction or alienation by such heirs shall be removed in the following language:

> * * * When the heirs of such deceased allottees have certificates of competency or are not members of the tribe the restrictions on alienation are hereby removed.

The right of Congress to reimpose restrictions on alienation can not now be questioned.

Brader v. *James*, 246 U. S. 88; *Talley* v. *Burgess*, 246 U. S. 104.

Sunday v. *Mallory*, decided January 7, 1919, not yet reported.

In *Brader* v. *James* the allotment was made during the lifetime of the allottee, but the 21-year restriction against alienation imposed by section 12 of the Choctaw and Chickasaw Agreement of July 1, 1902, 32 Stat. 641, 642, had been removed by the death of

the allottee before the act of April 26, 1906, 34 Stat. 137, 145 (sec. 22), which provided as follows:

> That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.

The question was whether a conveyance after this act by a full-blood Choctaw heir of the allottee required for its validity approval by the Secretary of the Interior, or, in other words, whether, the restriction against alienation imposed by the Choctaw and Chickasaw Agreement having been removed, Congress had the right to reimpose the restriction provided in the statute requiring all conveyances made by full-blood heirs to be subject to the approval of the Secretary. The right of Congress to reimpose this restriction was upheld.

In *Talley* v. *Burgess* and *Sunday* v. *Mallory* the allotments in question were made after the death of the allottee. The *Talley* case involved an agreement with the guardian of a minor Indian heir, and the *Sunday* case involved conveyances of adult full-blood Indian heirs. The case of *Sunday* v. *Mallory* was reversed without opinion, on the authority of *Brader* v. *James* and *Talley* v. *Burgess*, and in the latter case the court said (p. 108):

> It is contended that this section applies only to heirs of a deceased Indian whose selection has been made by himself, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which the decedent belonged. But in our view Congress in the passage of section 22 had in contemplation that an Indian duly enrolled and entitled to share in the tribal property and lands might die before receiving the allotment to which he, or she, was entitled. Congress had made provision in section 20 of the Cherokee Agreement that such land might be allotted in the name of the deceased, and should with the proportionate share of the other tribal property descend to the heirs of the one who would have been entitled, if living. It also provided that the selection for a decedent should be made by a duly appointed administrator or executor, or, in default of such selection, the Dawes Commission should designate the land to be allotted. We think minor heirs who thus receive lands are within the meaning and purpose of the statute, as much so as they would have been had the land been selected by the ancestor in his lifetime.

While section 22 of the act of April 26, 1906, is not identical in its terms with the act of June 28, 1906, under consideration here, the purposes of the acts are sufficiently similar to make the reasoning in these cases apply to the case at bar, and there is no more reason why the incompetent heirs of Osage allottees are not within the meaning and purposes of the statute in this case, if the lands were apportioned to the allottee after her death, than they would have been had the land been apportioned by the Osage commission during her lifetime.

Nor is there anything in section 22 of the act of April 26, 1906, any more definitely evidencing the intention of Congress that the restrictions therein should apply to allotments made after the death of the allottee than appears in the Osage Allotment Act that the restrictions in that act were intended to apply to allotments made to deceased Osage allottees after death. On the contrary, Congress specifically authorized in the case of Osage Indians the allotment of the Osages on the roll of the tribe as it existed January 1, 1906. This clearly contemplated that an Indian on this roll might die before receiving the allotment to which he or she was entitled, or, indeed, that such an Indian might have died between January 1, 1906, and the date of the passage of the act. In view of this, there is a proviso that the lands of a deceased member should descend to his or her legal heirs. The Osage Commission was authorized to designate the additional surplus allotment just as in the case of the Cherokees the Dawes Commission was authorized, in default of selection by the allottee, to

designate the land to be allotted. In view of the decisions of this court relative to the statute affecting the Five Civilized Tribes, and of the similarity of the statute passed at the same session of Congress providing for the individual allotment of the Osages, it can not be controverted that the incompetent Osage full-blood Indians who inherit lands from allottees to whom allotments were made after death come within the stated restrictions and "within the meaning and purpose of the statute as much so as they would have been had the land been selected by the ancestor in his lifetime."

As before pointed out, section 3 of the act of April 18, 1912, confers jurisdiction upon the county courts of the State of Oklahoma in probate matters, but provides that no lands shall be sold or alienated thereunder without the approval of the Secretary of the Interior; and section 6 confers power upon courts of competent jurisdiction in the State of Oklahoma to partition the land of deceased Osage allottees in accordance with the laws of the State of Oklahoma, but provides that no partition or sale should be valid without the approval of the Secretary of the Interior. The district courts of Oklahoma are courts of competent jurisdiction in accordance with the laws of that State for the partition of lands, and in the proceedings for partition in this case before that court it determined the heirs as a necessary proceeding in partition matters and decreed the sale of the land. Probate proceedings had been taken in the County Court previously to the commenc-

ing of partition proceedings in the District Court by Miles upon a petition for letters of administration, but the proceedings in the County Court were suspended after the appointment of an administrator and the filing of the partition proceedings in the District Court. The findings of the District Court in the partition proceedings were pleaded and sustained as *res judicata* in the subsequent probate proceedings in the County Court, and this was affirmed by the District Court upon appeal, where the matter came up *de novo* (R. 21, 22).

It is apparent that if the lands of the deceased allottee are restricted lands, the action of the District Court was incomplete and invalid until approved by the Secretary of the Interior. While the invalidity of the order sustaining the plea of *res judicata* is perhaps a matter for the determination of the Secretary of the Interior in further proceedings herein, it is clear that an invalid order can not be invoked to sustain a plea of *res judicata*.

The jurisdiction existing in the District Court of Oklahoma to partition the restricted land of the deceased allottee was only that expressed in the act of Congress. In exercising this jurisdiction its power was limited by the act and its judgment had no validity until approved by the Secretary. Its function is that of a Federal agency and it "does not exercise judicial power conferred by the laws or constitution of the State of Oklahoma, nor any Federal judiciary power. *Truskett et al.* v. *Closser*, 198 Fed. 835"; *Okla. Oil Co.* v. *Bartlett*, 236 Fed. 488, 494.

"According to the language of all the authorities, to conclude the parties the former judgment must have been final." *Harmon* v. *Struthers*, 48 Fed. 260, 261.

It is well settled that in order to support *res judicata* there should have been a judicial determination of the rights in controversy with a final decision thereon. The mere findings of fact by the court upon which no judgment has been directed do not constitute a judgment or raise an estoppel. *Bouldin* v. *Phelps*, 30 Fed. 547, 578; *John II Estate* v. *Brown*, 201 Fed. 224, 242, and cases cited.

Until the action of the Secretary of the Interior in partition proceedings was entered the matter therefore was *sub judice*, and the findings and judgment of the District Court are not *res judicata*. In order to give the judgment in partition validity, Congress required the approval of the Secretary, and the judgment of the Secretary and not the findings and judgment of the District Court definitively settles the controversy in this case. The findings or judgment of the District Court is the preliminary determination of the case upon which the final judgment of the Secretary is to be entered. The case is analogous to one where there is a verdict of the jury or findings of a court upon which no formal nor final judgment has been entered. The language of this court in *Oklahoma City* v. *McMaster*, 196 U. S. 529, 533, is in point:

> Without a judgment the plea of *res judicta* has no foundation; and neither the verdict of

a jury nor the findings of a court, even though in a prior action, upon the precise point involved in a subsequent action and between the same parties, constitute a bar. In other words, the thing adjudged must be by a judgment. A verdict, or finding of the court alone, is not sufficient. The reason stated is, that the judgment is the bar and not the preliminary determination of the court or jury. It may be that the verdict was set aside, or the finding of facts amended, reconsidered, or themselves set aside or a new trial granted. The judgment alone is the foundation for the bar. *Springer* v. *Bien*, 128 N. Y. 99.

CONCLUSION.

The judgment of the Supreme Court of the State of Oklahoma, holding that the District Court had complete jurisdiction to partition and sell these lands without the approval of the Secretary of the Interior, is therefore erroneous and should be reversed and the case be remanded to that court with directions to remand it to the District Court with leave to John Kenny, the petitioner herein, to pursue his remedy before the Secretary of the Interior.

Respectfully submitted.

ALEX. C. KING,
Solicitor General.
FRANCIS J. KEARFUL,
Assistant Attorney General.

JANUARY, 1919.

APPENDIX "A."

Schedule of first, second, and third selections of the Osage Indians, residing on the Osage Reservation in Oklahoma, made by the Osage Allotting Commission, under the provisions of the act of Congress, approved June 28, 1906 (34 Stat. L., 539), and the instructions of the Indian Office of August 4, 1906.

Allotment No.	Name of allottee.									Subdivision.	Section.	Town.	Range.	Acres.	100ths.	Area reserved for railroad purposes.			Remarks.
	Permanent name.			Indian name.	English translation or English name.	Male.	Female.	Age.	Relation in family.							M., K. & T.	M. V.	A., T. & S. F.	
	Reg. No.	Surname.	First name.																
255	260	.....	.....	.....	Richard Kenny	M.	....	52	Head.	First selection Hd.: NE.¼	31	23	8	160	....	.....	.....	.....	Homestead.
										Second selection: W.½ of SW.¼	5	.....	.....	.....	....	.....	.....	.....	
										N.½ of NW.¼	8	24	7	160	....	.....	.....	.....	
										Third selection: SW.¼	9	24	7	160	....	.....	.....	.....	
256	265	.....	.....	Lah tah sah	.....	....	F.	48	Head.	First selection Hd.: NW.¼	26	24	4	160	....	.....	.....	.....	Homestead.
										Second selection: NE.¼	30	28	9	160	....	.....	.....	.....	
										Third selection: SE.¼	30	28	9	160	....	.....	.....	.....	
257	266	.....	.....	.....	John Kenny	M.	....	25	Head.	First selection Hd.: Lots 2, 3, and 4	25	.....	.....	.....	.....	.....	.....	.....	Homestead.

										SE.¼ of NE.¼; NE.¼ SE.¼	26	24	4	146	85	.....	.....	.....	Homestead.
										Second selection: SE.¼	6	27	9	160	.....	.....	.....	.....	
										Third selection: Lots 1 and 2; S.½ of NE.¼	6	27	9	161	13	.....	.....	.....	
258	267	.....	.....	Wah hrah tum pah.	.....	.....	F	22	Wife..	First selection Hd.: SW.¼	9	24	6	160	.....	.....	.....	.....	Homestead.
										Second selection: SE.¼	12	25	3	160	.....	.....	.....	.....	
										Third selection: SW.¼	15	25	9	160	.....	.....	.....	.....	Petition to sell.

NOTE.—Initials heading the column of "Area reserved for railroad purposes" designate railroad companies as follows: "M., K. & T." designates Missouri, Kansas & Texas Railway Company, total area reservations, 1,114.09 acres; "M. V." designates Midland Valley Railroad Company, total area reservations, 1,267.50 acres; "A., T. & S. F." designates Atchison, Topeka & Santa Fe Railway Company, total area reservations, 612.49 acres.

We, the undersigned, comprising the Osage Allotting Commission, hereby certify that the first, second, and third selections of lands as shown on the attached and foregoing schedule, embracing pages Nos. 1 to 715, both inclusive, were made by or for the Osage Indians, and was duly allotted to them by us in the capacity of the Osage Allotting Commission; that each person whose name appears on said schedule is legally entitled to the land assigned him or her, and that the selections and allotments were made in conformity to the provisions of the act of Congress approved June 28, 1906 (34 Stat. L., 539), and the instructions of the Commissioner of Indian Affairs of August 4, 1906.

Done at Pawhuska, Oklahoma, the sixteenth day of June, 1908.

CHAS. E. MCCHESNEY,
Chairman.

CASSIUS R. PECK,
Commissioner.

BLACK DOG (his x mark),
Commissioner.

Witnesses:
WILLIAM PRYOR.
HEALY N. LOOMIS.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, D. C., November 19, 1908.

The annexed and foregoing schedule of first, second, and third selections of the Osage Indians, made in accordance with the provisions of the act of Congress approved June 28, 1906 (34 Stat. L., 539), is respectfully submitted to the Secretary of

the Interior with the recommendation that it be approved.

C. F LARRABEE,
Acting Commissioner.

DEPARTMENT OF THE INTERIOR,
Washington, November 19, 1908.

Agreeably to the recommendation of the Acting Commissioner of Indian Affairs, the annexed and foregoing schedule of first, second, and third selections of the Osage Indians, made in accordance with the provisions of the act of June 28, 1906 (34 Stat. L., 539), is hereby approved, and the Commissioner of Indian Affairs is hereby directed to cause deeds to be executed to the allottees therein named conformably with the provisions of the said act of Congress.

JESSE E. WILSON,
Assistant Secretary.

100263—19——3

Schedule of final division of Osage lands for Osage Indians residing on the Osage Indian Reservation in Oklahoma, made by the Osage Allotting Commission, under the provision of the Act of Congress approved June 28th, 1906 (34 Stat. L. 539) and the instructions of the Indian Office of August 4th, 1906.

Allotment No.	Name of allottee.								Relation in family.	Subdivision.	Section.	Town.	Range.	Acres.	100ths.	Area reserved for railroad purposes.			Remarks.
	Permanent name.			Indian name.	English translation or English name.	Male.	Female.	Age.								M.K. & T.	M.V.	A.T. & S.F.	
	Reg. No.	Surname.	First name.																
256	205	.....	.....	Lah-tah-sah...	.....	....	F.	48	Head.	Lot 3, E½ of SW¼ of NW¼, SE¼ of NW¼ and N½ of SE¼.	4	20	10	180	12	.....	.....	.....	Tel rpd. 190, 3/18.
257	206	.....	.....	.....	John Kenny..	M.	....	25	Head.	Lots 1 and 2, S½ of NE¼, N½ of NE¼ of SW¼ and SW¼ of NE¼ of SW¼ of.	1	22	9	190	09	.....	.....	.....	

NOTE.—Initials heading the column of "Area reserved for railroad purposes" designate railroad companies as follows: "M., K. & T." designates Missouri, Kansas & Texas Railway Company; total area reservation, 254.08 acres. "M. V." designates Midland Valley Railroad Company; total area reservation, 131.32 acres. "A., T. & S. F." designates Atchison, Topeka & Santa Fe Railway Company; total area reservation, —— acres.

We, the undersigned, comprising the Osage Allotting Commission, hereby certify the final division of lands as shown on the attached and foregoing schedule, embracing pages Nos. 1 to 183, both inclusive, was made for the Osage Indians, and that the said lands were duly allotted to them by us in the capacity of the Osage Allotting Commission, and that the said final division was made in conformity to the provisions of the act of Congress approved June 28, 1906 (34 Stat. L., 539), and the instructions of the Commissioner of Indian Affairs of August 4, 1906.

Done at Pawhuska, Oklahoma, this 29th day of March, 1909.

CHAS. E. McCHESNEY,
Chairman.

CASSIUS R. PECK,
Commissioner.

BLACK { his mark } DOG,
Commissioner.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, Aug. 2, 1909.

The annexed and foregoing schedule of final division of lands of the Osage Indians, made in accordance with the provisions of the act of Congress of June 28, 1906 (34 Stat. L., 539), is respectfully submitted to the Secretary of the Interior with the recommendation that it be approved.

F. H. ABBOTT,
Assistant Commissioner.

Witnesses:
WILLIAM PRYOR,
ROY R. MASSEY.

DEPARTMENT OF THE INTERIOR,
Washington, Aug. 2, 1909.

Agreeably to the recommendation of the Commissioner of Indian Affairs, the annexed and foregoing schedule of final division of lands of the Osage Indians, made in accordance with the provisions of the act of Congress of June 28, 1906 (34 Stat. L., 539), is hereby approved, and the Commissioner of Indian Affairs is hereby directed to cause deeds to be executed to the allottees therein named, conformably with the provisions of said act of Congress.

FRANK PIERCE,
Acting Secretary.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, Jan. 13, 1919.

I, E. B. Meritt, Assistant Commissioner of Indian Affairs, do hereby certify that the papers hereto attached are true copies of the originals as the same appear on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed on the day and year first above written.

[SEAL.] E. B. MERITT,
Assistant Commissioner.

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